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CITIBANK BHD

v.

MALWIRA MANUFACTURING SDN BHD

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HIGH COURT MALAYA, PULAU PINANG
VARGHESE GEORGE VARUGHESE JC
[COMPANIES (WINDING-UP) NO: 28-138-2010]
9 MARCH 2011

C ***COMPANY LAW:*** *Winding-up - Opposition to petition - Company viable and ongoing - Displacement of employees - Petition in English and not in Bahasa Malaysia - Whether grounds for dismissing petition - Companies Act 1965, s. 218*

D The petitioner filed a winding-up petition against the respondent following the respondent's failure to settle a summary judgment sum of RM2,821,592.14 which the petitioner had obtained against the respondent. Two other creditors filed their respective notices of intention to appear on the petition and to support the same. The respondent raised two objections, *ie*, (1) that the respondent E was a viable and ongoing concern and that its employees would be displaced if a winding-up order was made against the respondent, and (2) that the petition was defective as it was in English and not in Bahasa Malaysia.

F **Held (allowing the petition):**

(1) The respondent did not produce any contemporaneous document in respect of the current operations, its management or latest available audited accounts to impress the court that G it was an ongoing concern and/or that it was able to meet its liabilities as and when they became due so as to show that it was not commercially insolvent. (para 12)

(2) The respondent's inability to pay its debts was drawn from all H the relevant facts of this case as made available to the court. A judgment had been entered against the respondent for the outstanding sums and there was no appeal against that judgment. That the judgment in place was a summary judgment was of no consequence either. The statutory demand issued pursuant to s. 218 of the Companies Act 1965 I remained unsatisfied. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not in any way displaced. The

respondent also did not explain as to how its debts to the two supporting creditors were to be discharged. The *bona fides* of the respondent's contention that it was still a viable and ongoing business concern and that it was able to meet its liabilities was seriously suspect in such circumstances. Further, the fact that the employees would be displaced if the winding-up order was made was not a valid or recognised ground to dismiss the petition. (paras 13, 14 & 15)

(3) There was no doubt that an attempt to file a further affidavit and raise two unmeritorious grounds of objections at this stage were merely to delay the obvious inevitable end to the respondent as a business entity. In any event with the appointment of a liquidator, certain aspects of the business might be retained if deemed viable. Further, if there was an orderly winding-down of the respondent, the affected employees would at least be guaranteed of some benefits that they would be entitled to in law in order of priority of application of proceeds. (para 16)

(4) There was no objection to the petition being in the English Language in the particular situation of a winding-up proceeding (*Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd*, foll; the Registrar's Circular 5/1990). It followed that as all related papers were confirmed to be in compliance with the provisions of the Companies (Winding-Up) Rules 1972, the petition should therefore be allowed. (paras 17 & 18)

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. GKM Amal Bhd [2000] 2 CLJ 525 HC ***(refd)***

SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***

Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd [2006] 3 CLJ 592 HC ***(foll)***

Siti Esah Talib v. Mentiga Corporation Bhd [2010] 5 CLJ 712 HC ***(dist)***

Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

For the petitioner - Lucia Minta; M/s Darshan Singh & Co
For the respondent - AS Lua; M/s Soo Thien Ming & Nashrah

Reported by Usha Thiagarajah

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JUDGMENT

Varghese George Varughese JC:

[1] On 3 January 2011, I had in respect of this winding-up petition made the following orders:

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(a) That the respondent be wound-up by the court under the provisions of the Companies Act, 1965;

(b) That Dato' Robert Teo Keng Tuan (NRIC No. 500504-08-6225) be appointed liquidator of the respondent; and

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(c) That the costs of the petition be paid out of the assets of the respondent.

[2] The respondent has, by a notice of appeal filed on 14 January 2011 now appealed against my aforesaid orders. I therefore set out below the grounds for my decision.

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[3] The petitioner had moved the court *vide* encl. 1 to wind-up the respondent on the grounds that the respondent was unable to pay its debts. The petitioner had extended various banking facilities to the respondent and had on 27 April 2010 entered summary judgment against the respondent in Penang High Court, Guaman No. 22-566-2008 for a sum of RM2,821,592.14 and for payment of further commission thereon as set out in the terms of the judgment of court exhibited as Annexure A to the petition. There was no appeal against this judgment by the respondent.

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[4] The petitioner had then issued a statutory notice dated 20 September 2010 pursuant to s. 218 of the Companies Act, 1965 and had duly served the same on the respondent. The respondent failed to settle the sum demanded within the stipulated 21 days after service or at any time subsequently until hearing of the petition before me.

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[5] The respondent had filed a notice of intention to oppose the petition dated 22 November 2010, and this was followed by an 'afidavit jawapan' affirmed on 24 November 2010 and filed on 29 November 2010. Paragraphs 3 and 5 of the 'afidavit jawapan' are reproduced here:

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> 3. Saya menegaskan bahawa Responden adalah suatu syarikat yang masih beroperasi dan menjalankan perniagaan. Ia mempunyai lebihkurang 125 orang pekerja tempatan dan 196 orang pekerja warganegara asing.

5. Responden akan kehilangan pendapatan dan perniagaan dan juga pesanan untuk barang-barang pelanggan dari dalam dan luar negara dan ini akan menyebabkan 321 orang pekerja Respondent tersebut juga akan kehilangan kerja dan menjadi penggangur sekiranya perniagaan Respondent dibekukan.

[6] Subsequent to the advertisement of the petition two parties filed their respective notices of intention to appear on petition and to support the same. They were as set out below with the alleged debts owed by the respondent to them shown against their respective names:

(a) Bank Islam Malaysia Berhad	- RM44,128,581.76 (being principal outstanding as at 31 January 2010 with further interest thereon.)
(b) Orix Credit Malaysia Sdn Bhd	- (i) RM2,286.124.76 (principal and interest outstanding as at 27 December 2010)
	(ii) RM9,346,460.29 (principal and interest outstanding as at 27 December 2010)

[7] When the petition came up for hearing, counsel for respondent sought for an adjournment to file a further affidavit, ostensibly to now raise an issue as regards the proper service of the petition and also to advance the contention that the petition ought to have been presented in Bahasa Malaysia, and not in English as was the case here.

[8] I did not allow the adjournment sought by the respondent, since even if there was any reason to challenge the due service of the petition, the respondent had not raised the said issue in the 'affidavit jawapan' which the respondent had proceeded to file, despite the purported 'improper service' of the petition on the respondent.

[9] Counsel for the respondent then restricted the respondent's objection to the petition on two grounds. They were that:

(a) The respondent was a viable and ongoing concern and a Winding-Up Order should not in the circumstances be made against the respondent; and

A (b) The petition here was defective as it was in English and not in Bahasa Malaysia.

[10] The respondent's counsel relied on the decision in *Siti Esah Talib v. Mentiga Corporation Bhd* [2010] 5 CLJ 712, as support for the proposition that the court should be slow to issue a winding-up order, particularly if there are other modes of execution available and the company sought to be wound-up, was an ongoing business concern.

[11] I could not agree that the decision of VT Singham J in *Siti Esah* was of any assistance to the respondent in this case. The facts had to be distinguished. That case involved a public-listed company (a developer) and there were also offers made by the company to settle the LAD (liquidated ascertained damages) arising from late delivery of residential units to some purchasers. In such circumstances, the insistence of the petitioners there to proceed with the winding-up was considered by the learned judge to be calculated to embarrass and put pressure on the company. Such was not the case obtaining in the instant petition before this court.

[12] Further, here the respondent had not produced any contemporaneous document in respect of the current operations, nor the respondent's management or latest available audited accounts to at least *prima facie* impress the court that it was indeed an ongoing concern and/or that it was able to meet its liabilities as and when they become due (that is, to demonstrate that the respondent was not commercially insolvent). (See: *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303).

[13] I need only say that the conclusion by the court on the issue of the respondent's 'inability to pay its debts' was to be drawn from all the relevant facts of this instant case as made available to the court. A judgment had been entered against the respondent for the sums outstanding and there was no appeal against that judgment. That the judgment in place was a summary judgment was of no consequence either. (See: *Bank Utama (Malaysia) Bhd v. GKM Amal Berhad* [2000] 2 CLJ 525; *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329).

[14] The statutory demand issued pursuant to s. 218 of the Companies Act, 1965 by the petitioner remained unsatisfied by the respondent. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not displaced in any way.

[15] Also there was no answer by the respondent as to how the rather large sums owed to the two supporting creditors as detailed above in this grounds of decision were to be discharged. The *bona fide* of the respondent's contention that it was still a viable and ongoing business concern and that it was able to meet its liabilities was seriously suspect in such circumstances. The fact that employees would be displaced if the winding-up order is made was not a valid or recognised ground at all to disallow the winding-up order.

[16] To me there was no doubt that the attempt to file at this stage a further affidavit and the two unmeritorious grounds of objections raised were merely to delay what was obviously an inevitable end to the respondent as a business entity. In any event, with the appointment of a liquidator (in this case, a private liquidator) there might arise some consolation in that certain aspects of the business, if deemed viable might be retained, or at least in a worst case scenario, there would be an orderly winding-down of the respondent with the affected employees guaranteed at least of some benefits they are entitled to in law in order of priority of application of proceeds.

[17] As regards, the second ground of the respondent's objection (that is, the petition ought to have been in Bahasa Malaysia), one need only refer to the decision in *Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd* [2006] 3 CLJ 592 and the Registrar's Circular 5/1990 reproduced in full therein to underscore this totally misconceived argument of the respondent in opposing the Petition. In the particular situation of a Winding-Up proceeding, there was no objection to the petition being in the English language.

[18] As all related papers had been confirmed to be in compliance with the provisions of Winding-Up Rules, I allowed the petition and made the orders set out above.